Public Prosecutor v Kuna Segaran a/l Muniandy

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–43 AND 203 OF 2010
KN SEGARA, SULONG MATJERAIE AND AZHAR JJCA
14 NOVEMBER 2011

Criminal Procedure — Witness — Material witness — Tenant of house where drugs and poison were found not called as witness — Tenant arrested during police raid but released to become prosecution witness — Whether tenant deemed to have custody and control of things in house until contrary proven — No evidence to show accused exclusive occupier or user of room in house — Nothing to link accused to subject matter of charges — Whether self-incriminating statements by accused to police admissible in evidence — Failure to administer caution under s 37A(1) of the Dangerous Drugs Act 1952

The respondent ('accused') was charged in the High Court for trafficking in 12,654.14g cannabis ('the first charge') and for possession of 9.20g theophylline ('the second charge') under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and s 9(3) of the Poisons Act 1952, respectively. At the close of the prosecution's case, the trial judge ruled that with regard to the first charge the prosecution had made out a prima facie case against the accused for possession of 930.14g cannabis found in a black sling bag ('exh P8'). She reduced the first charge to one of possession and called on the accused to enter his defence to the charge. The judge ruled no prima facie case had been made out on the second charge in respect of which the accused was acquitted and discharged. On the reduced charge, the accused gave evidence on oath without calling witnesses. He was found guilty and sentenced to 12 years' jail and10 strokes of the rotan. The prosecution appealed to the Court of Appeal against the trial judge's decision to reduce the first charge while the accused appealed against his conviction and sentence. There was no appeal against the decision on the second charge. According to the prosecution's version of events, a police party raided a house where they arrested the accused and the tenant of the house named Murugan. From one of the rooms, they found a green bag on the floor containing cannabis and theophylline. Exhibit P8 was hanging on the wall near three items of clothing that allegedly belonged to the accused. Based on information allegedly given by the accused at the scene, the police arrested another man ('Appene') from the adjoining house. Neither Murugan nor Appene was called to testify for the prosecution. The prosecution informed the court that Murugan was released from arrest because of a purported lack of evidence against him and he was to have become a prosecution witness in the trial.

Held, allowing the accused's appeal and setting aside his conviction and sentence and dismissing the prosecution's appeal:

(1) The prosecution had failed to establish a prima facie case of possession to warrant the trial judge to call upon the accused to enter his defence, either on a charge of trafficking or on a charge of possession of cannabis (see para 7).

(2) There was no evidence the accused had hung exhibit P8 on the wall in the room. More importantly, there was nothing inside P8 to positively connect the accused with custody and control of it, for example, his name embossed on the bag or some identification documents relating to the accused found inside the bag (see para 27).

(3) Nothing, directly or indirectly, connecting the accused to the subject matter of the charges was found in the room where the drugs and poison were recovered. There was no evidence the accused was a sub-tenant of the house or was the exclusive occupier or user of any of the rooms. Neither was there evidence he had a set of keys to the house. The doors of the three rooms did not have any lock (see para 14).

(4) Murugan, as the tenant and occupier of the house had care and management of the premises and was prima facie deemed to have custody and control, possession and knowledge of all the contents within the house from the date of his tenancy until the contrary was established. Without his evidence, the prosecution failed to establish the accused was the exclusive occupier or user of the room where the drugs and poison were found, to attract any inference of possession on his part (see para 16).

(5) As no caution was administered to the accused under s 37A(1) of the DDA at any time, statements the accused made to the police after his arrest incriminating himself were inadmissible in evidence. Such statements, which were wrongly admitted in evidence, should not have influenced the trial judge in assessing a prima facie case (see para 28).

(6) There was no justification for any inference that the accused's conduct at the time of his arrest, or immediately thereafter, established guilty knowledge of the subject matter of the charges and mens rea possession of same (see para 28).

[Bahasa Malaysia summary

Responden ('tertuduh') dituduh di Mahkamah Tinggi kerana mengedar sebanyak 12,654.14g kanabis ('tuduhan pertama') dan untuk milikan sebanyak 9.20g theophylline ('tuduhan kedua') masing-masing di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan s 9(3) Akta Racun 1952. Pada akhir kes pendakwaan, hakim perbicaraan memutuskan bahawa mengenai tuduhan pertama pihak pendakwaan telah membuat kes prima facie

terhadap tertuduh untuk milikan sebanyak 930.14g kanabis yang didapati di dalam beg gantung berwarna hitam ('ekhs P8'). Beliau mengurangkan tuduhan pertama kepada milikan dan memanggil tertuduh untuk memasukkan pembelaannya kepada tuduhan tersebut. Hakim memutuskan tiada kes prima facie dibuat atas tuduhan kedua oleh itu tertuduh dilepaskan dan dibebaskan. Atas tuduhan yang dikurangkan, tertuduh memberi keterangan bersumpah tanpa memanggil saksi-saksi. Dia didapati bersalah dan dihukum hingga 12 tahun penjara dan 10 sebatan rotan. Pihak pendakwaan merayu ke Mahkamah Rayuan terhadap keputusan hakim perbicaraan untuk mengurangkan tuduhan pertama sementara tertuduh merayu terhadap sabitan dan hukumannya. Tidak terdapat rayuan terhadap keputusan atas tuduhan kedua. Mengikut versi kejadian pihak pendakwaan, pihak polis menyerbu rumah di mana mereka menangkap tertuduh dan penyewa rumah yang bernama Murugan. Daripada salah satu bilik, mereka mendapati beg berwarna hijau atas lantai mengandungi kanabis dan theophylline. Ekshibit P8 tergantung di dinding berdekatan tiga pakaian yang didakwa pakaian tertuduh. Berdasarkan maklumat yang didakwa diberikan oleh tertuduh di tempat kejadian, polis menangkap seorang lelaki lain ('Appene') dari rumah bersebelahan. Bukan Murugan ataupun Appene dipanggil untuk memberi keterangan bagi pihak pendakwaan. Pihak pendakwaan memaklumkan mahkamah bahawa Murugan dilepaskan daripada penahanan kerana keterangan yang tidak mencukupi terhadapnya dan dia akan menajadi saksi pihak pendakwaan di dalam perbicaraan.

Diputuskan, membenarkan rayuan tertuduh dan mengenepikan sabitan dan hukumannya dan menolak rayuan pihak pendakwaan:

(1) Pihak pendakwaan gagal untuk membuktikan kes prima facie milikan untuk mewajarkan hakim perbicaraan untuk memanggil tertuduh memasukkan pembelaannya, sama ada atas tuduhan mengedar atau tuduhan memiliki kanabis (lihat perenggan 7).

(2) Tidak terdapat keterangan tertuduh menggantung eksh P8 di dinding bilik tersebut. Lebih penting, tidak terdapat apa-apa di dalam P8 dengan positif menghubungkan tertuduh dengan jagaan dam kawalannya, contohnya, namanya dicetak timbul di atas beg atau beberapa dokumen pengenalan berkaitan tertuduh didapati di dalam beg tersebut (lihat perenggan 27).

(3) Tiada apa pun, secara terus atau tidak, menghubungkan tertuduh kepada perkara subjek tuduhan-tuduhan didapati di dalam bilik tersebut di mana dadah dan racun diperolehi. Tidak terdapat keterangan yang tertuduh adalah penyewa bersama rumah tersebut atau penghuni eksklusif atau pengguna mana-mana bilik tersebut. Juga tidak terdapat keterangan yang dia mempunyai set kunci rumah tersebut. Pintu-pintu ketiga-tiga bilik tidak mempunyai apa-apa kunci (lihat perenggan 14).

A (4) Murugan, sebagai penyewa dan penghuni rumah mempunyai jagaan dan pengurusan premis tersebut dan adalah dianggap prima facie mempunyai jagaan dan kawalan, milikan dan pengetahuan mengenai kesemua kandungan dalam rumah dari tarikh penyewaannya sehingga perkara bertentangan dibuktikan. Tanpa keterangannya, pihak
B pendakwaan gagal untuk membuktikan yang tertuduh adalah penghuni eksklusif atau pengguna bilik tersebut di mana dadah dan racun diperolehi, untuk menarik apa-apa inferens milikan ke atasnya (lihat perenggan 16).

C (5) Memandangkan amaran tidak dilaksanakan kepada tertuduh di bawah s 37A(1) ADB pada bila-bila masa, penyataan-penyataan yang dibuat tertuduh kepada polis selepas penangkapannya menunjukkan dia bersalah tidak boleh diterima dalam keterangan. Penyataan-penyataan sedemikian yang mana secara salah dimasukkan di dalam keterangan, tidak patut mempengaruhi hakim perbicaraan dalam menilai kes prima
D facie (lihat perenggan 28).

(6) Tidak terdapat justifikasi untuk apa-apa campur tangan bahawa tindakan tertuduh pada masa penangkapannya, atau sebaik saja kemudiannya membuktikan pengetahuan bersalah terhadap perkara subjek
E tuduhan-tuduhan dan mens rea milikannya (lihat perenggan 28).]

Notes

For cases on material witness, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5518.

F

Cases referred to

Magendran Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)

Legislation referred to

G Dangerous Drugs Act 1952 ss 37A(1), 39A(2), 39B(1)(a)(2)
Poisons Act 1952 ss 9(3), 32(5)

Karpal Singh (Ram Karpal with him) (Karpal Singh & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

H

KN Segara JCA (delivering judgment of the court):

[1] The accused, Kuna Segaran a/l Muniandy, was charged in the High
I Court, Shah Alam, with two offences committed at the same time and place, on 17 May 2006, at about 11.30pm, at house No C4, Jalan Air Hitam, Batu 1714, Puchong, Selangor.

[2] The first charge was for the offence of trafficking in 12,654.14g of

cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s 39B(2) of the same Act (DDA 1952). A

[3] The second charge was for the offence of possession of 9.20g of theophylline under s 9(3) of the Poisons Act 1952, and punishable under s 32(5) of the same Act (PA 1952). B

[4] At the close of the prosecution's case, the trial judge ruled, as to the first charge, that a prima facie case had been made against the accused for possession of 930.14g of cannabis found in a black sling bag (P8) and reduced the first charge to one of possession punishable under s 39A(2) of the DDA 1952, and called upon the accused to enter his defence on the reduced charge. C

[5] As to the second charge, the trial judge ruled that the prosecution had not made out a prima facie case against the accused and the accused was accordingly acquitted and discharged. D

[6] The accused claimed trial on the reduced first charge and gave evidence on oath. He did not call any witnesses. The trial judge found the accused guilty on the reduced charge and sentenced him to 12 years imprisonment, with effect from the date of his arrest, and to ten strokes of the rotan. E

[7] There are two appeals before us. The public prosecutor has appealed against the trial judge's finding on the first charge that at the close of the prosecution's case the prosecution had failed to establish a prima facie case of trafficking by the accused in *12,654*g of cannabis (Mahkamah Rayuan Appeal No B-05–43 of 2010). There is no appeal by the public prosecutor on the accused's acquittal and discharge on the second charge at the close of the prosecution's case, without the accused being called upon to enter his defence. F G

[8] The accused has appealed on his conviction and sentence on the first (reduced) charge (Mahkamah Rayuan Appeal No B-05–203 of 2010).

[9] We heard both appeals together. The appeal by the public prosecutor was dismissed and the appeal by the accused was allowed. The conviction and sentence by the trial judge was set aside. H

[10] We were unanimous in our view, upon a careful review of the evidence adduced by the prosecution, that the prosecution had failed to establish a prima facie case of possession to warrant the trial judge to call upon the accused to enter his defence, either on a charge of trafficking or on a charge of possession of cannabis. The trial judge was most certainly correct in acquitting and discharging the accused on the second charge under the PA 1952 as the I

physical and mental elements for possession, on the factual matrix, were patently absent. As the factual matrix for the possession for the first charge was almost identical for possession in the second charge, we are of the view the trial judge has lapsed into a serious error in misdirecting herself on the critical analysis of the facts, upon a maximum evaluation of the prosecution's evidence, on the first charge.

[11] It is well settled that the test at the end of the prosecution's case is 'prima facie case' based on a maximum evaluation of evidence. The Federal Court reiterated this principle in our criminal jurisprudence in *Magendran Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, and went on to add:

> The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a prima facie case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

[12] The charge sets out that the offences were committed at house No C4, Jalan Air Hitam and not at any particular room of the house. There were three rooms in the house. The house had a perimeter fence and a padlocked gate in front. The accused was not jointly charged with any other person.

[13] The evidence of the prosecution was unequivocal that the house was rented to one Muruga (Murugan) by the owner of the house, Sanif bin Mohammed (SP1).

[14] There was no evidence that the accused was a subtenant of the house, or the exclusive *occupier* of any of the three rooms in the house, or had the exclusive *use* to any one of the three rooms. There was no evidence that the accused had a set of keys to the house for ingress and egress at will, without the permission of the tenant, Murugan.

[15] The doors of the three rooms did not have any lock. The drugs and poison, the subject matter of the first and second charge, were found in one of the three rooms by the police on the night of the raid at the house. Three persons, including Murugan and the accused, were arrested in relation to the subject matter of the two charges on the night of the raid. Nothing, directly or indirectly, connecting the accused to the subject matter of the charges, was found in the same room where the subject matter of the charges was recovered. However, in that room there were two trousers and a shirt/jacket hanging on the wall, purportedly belonging to the accused, which were subsequently seized by the police. There was also a black sling bag hanging on the wall and a green bag on the floor which the police seized. There were numerous other items in that same room but the police neither established to whom the items belonged

nor what exactly was the nature of the items. The police did not make an inventory of all the items that were in the room. That room was obviously not used as a bedroom.

[16] In law, Murugan, the tenant, was the occupier of the house No C4. He has the care and management of the premises. Murugan, as occupier of the house, is prima facie deemed to have custody and control of the contents of all items within the house, from the date of the tenancy. He is deemed to have possession and knowledge of all the contents within the house *until the contrary is established.* In such circumstances, Murugan is an extremely important witness in the unfolding of events with regard to the presence of the subject matter of the charges found in the room in question, especially when the prosecution has elected *not to charge him* in respect of the said incriminating items found in the room. The trial judge has failed to direct her mind to this issue at the close of the prosecution's case and, in particular, to his responsibility and culpability as the sole tenant and occupier of the house having the care and management of the premises. This issue becomes even more critical because, when the investigating officer, SP7, was testifying, and upon being queried by the trial judge, there is on record that the DPP had informed the court that Murugan would not be called as a witness. This must be further weighed and critically evaluated with the testimony of SP7 that Murguan was released from arrest because of the purported lack of evidence against him, and that he was to be made a witness for the prosecution, instead. The record reads:

Mah: Atas pertanyaan Mahkamah Pn TPR memaklumkan Murgan tidak akan dipanggil sebagai saksi dan Mahkamah memutuskan semua keterangan Murugan di batalkan daripada rekod Mahkamah. Mahkamah benarkan Pn TPR untuk soal balik saksi atas perkara yang baru diputuskan itu untuk membetulkan rekod keterangan.

S: Adakah rakaman s 112 diambil daripada Murugan semasa siasatan kamu?

J: Ada, *setelah suspek dibebaskan dan saya rakam* s 112 KTJ.

S: Apakah hasil siasatan kamu berkaitan dengan Murugan?

J: Hasil siasatan saya setelah dirujuk kepada Timbalan Pendakwaraya Selangor *disebabkan kekurangan bukti ke atas Murugan* maka persetujuan TPR Murugan dibebaskan dan *dijadikan saksi pendakwaan.*

(Emphasis added.)

[17] This is not a case where the subject matter of the charges was found on the person of the accused, or in his apparel in the room, or in a bag belonging to him. This is not a case where the accused entered into the room and was found attempting to dispose off the subject matter of the charges, upon the police raiding the premises. This was not a case where the accused was running away to make an escape via the back door of the house, upon the arrival of the

police from the front of the house. This was not a case where the accused was trying to prevent his arrest by struggling with the police. In fact, the trial judge appears to have made a finding of fact that the accused was not running away from the police but had gone into the house, from the open front door of the house, to get the key to open the locked gate to let the police in. She said in her grounds of judgment:

> Di peringkat ini *mahkamah menerima inferens* yang mengikut pihak pembela menyebelahi OKT — b*ahawa OKT lari masuk untuk mengambil kunci dan buka pintu pagar rumah yang masih terkunci sebelum polis boleh masuk.*
>
> (Emphasis added.)

[18] Without the evidence of the tenant, Murugan, the prosecution has failed in its duty to establish that the accused was the exclusive occupier of the room or he had exclusive use of the room in which the subject matter of the charges were found, to attract any inference of possession by the accused. The evidence adduced by the prosecution wholly negates exclusive use or occupation of the room by the accused to warrant any prima facie case of mens rea possession by the accused, actual or passive, of the subject matter of the charges.

[19] Briefly, the salient facts of the case for the prosecution are as follows.

[20] On 17 May 2006, at about 10pm, C/Insp Munian a/l Muniandy (PW2), acting on information received, proceeded to house No C4, Jalan Air Hitam, Batu 17½ Puchong, Selangor, accompanied by a police party. On arrival at the scene at about 11.30 pm, he gave instructions to his party to take up positions around the sides and back of the house. PW2, PW3 and three other members of his party took up positions in front of the house. While PW2 was checking the front gate, which was locked, he saw the accused coming out from the main door of the house. The accused was about 15ft away from PW2, and when PW2 introduced himself as police, the accused rushed back into the house and went towards a room, marked as No 2, in the sketch plan (exh P5E).PW2 and his party climbed over the fence and chased after the accused. The accused was arrested in room No 2. He was alleged to be in a state of panic and frightened. C/I Chay Hu Yeen (PW4), who had also rushed into the house chasing the accused, arrested another Indian man, Murgan a/l Murugaian (Murugan), in the living room which was adjacent to room No 2. PW2 directed PW4 to bring Murugan into room No 2 for examination. PW4 had ascertained that there was no other person in the house.

[21] PW2 conducted a search in room No 2. He discovered a zipped green bag with the words 'Top Star' (exh P7) covered with a white cloth *on the floor.*

PW2 unzipped the green bag and found:

(i) 13 compressed packages, each wrapped with tin foil and transparent plastic, confirmed to be 1,1724g of cannabis; and

(ii) in the pocket of the bag, there was another ten plastic packets containing whitish granular and powdery substance, which on subsequent chemical analysis were found to be 9.20g of theophylline.

[22] PW2 found another black sling bag with the words 'Base Ball (exh P8) hanging on the wall of room No 2. Inside the black sling bag PW2 found:

(iii) one compressed package, wrapped in tin foil and transparent plastic, confirmed to be 881g of cannabis; and

(iv) an orange plastic bag which contained loose dry leaves, which on subsequent analysis found to be 49.14g of cannabis.

[23] PW2 found a 'Sansalon' shirt/jacket (exh P17), a 'Big Smith' trousers (exh P18) and a 'Louis' trousers (exh P19) hanging at the place where the black sling bag (exh P8) was discovered. The three items of clothing, namely, exhs P17, P18 and P19, were alleged to belong to the accused. There was no incriminating drugs or poison found on the person of the accused or in exhs P17, P18 and P19.

[24] The total weight of the cannabis found in the green bag (exh P7) and the black sling bag (exh P8) formed the subject matter of the first charge, whereas the 9.20g of theophylline in the ten plastic packets found in the green bag (exh P7), formed the subject matter of the second charge.

[25] Upon information received from the accused by PW2, in the course of inspecting the black sling bag, PW4 arrested Bhaskaran a/l Krishnan (Appene) from the adjoining house. Just as Murugan was not called to testify for the prosecution, Appene, too, did not testify for the prosecution.

[26] Before leaving the house for the police station with the three arrested persons and the exhibits seized, PW2 directed Murugan to lock the front door and the house gate. Murugan took the keys from the top of the television rack in the living room and complied with PW2's instructions and handed over the keys to the police.

[27] It is abundantly clear from the salient facts relied upon by the prosecution as set out above and, in particular:

(a) three items of clothing (exhs P17, P18 and P19) belonging to the accused were found hanging near the black sling bag (exh P8) in room No 2;

(b) the accused rushed back into the house and went towards room No 2 when PW2 identified himself as police from outside the locked gate; and

(c) the accused was in a state of panic and frightened when he was arrested;

it would be manifestly unsafe to pin the accused with possession of the cannabis that was discovered by PW2 when:

(a) there was not an iota of evidence that the accused had hung the said black sling bag on the wall in room No 2; and

(b) more importantly, there was nothing inside the black sling bag to positively connect the accused with custody and control of it, for example, his name was found embossed on the bag or some identification documents relating to the accused were retrieved by PW2 from inside the bag.

[28] We are of the view that there is no justification for any inference that the conduct of the accused at the time of his arrest, or immediately thereafter, establishes guilty knowledge of the subject matter of the charges and mens rea possession of same. In this regard, it has to be borne in mind that as no caution was administered to the accused under s 37A(1) of the ADB 1952 at any time, statements made to the police by the accused after his arrest (in room No 2) incriminating the accused, is inadmissible in evidence. Such statements, which were wrongly admitted as evidence, should not be allowed to influence the trial judge in assessing a prima facie case.

[29] In the above circumstances, the trial judge has seriously misdirected herself on the facts and the law of possession, when she only acquitted and discharged the accused on the second charge, but called upon him to enter his defence on an amended charge framed by the trial judge at the close of the prosecution's case.

[30] We are unanimous in our view that the accused should have been acquitted and discharged on the first charge without his defence being called, on the same token he was acquitted and discharged on the second charge.

[31] In the upshot, the conviction and sentence of the accused by the trial judge is set aside. The accused is, accordingly, acquitted and discharged.

Accused's appeal allowed and his conviction and sentence set aside and prosecution's appeal dismissed.

Reported by Ashok Kumar